No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RICHARD LOWRANCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in the context of a federal criminal prosecution against an extremely wealthy defendant who claimed his wealth showed lack of motive, it is permissible for the trial court to presume lack of prejudice against the wealthy and accordingly refuse to question prospective jurors during voir dire about their possible anti-wealthy bias.

2. Whether expert testimony, offered by the defendant in a federal criminal case to impeach a key prosecution witness, can be excluded based on a purported lack of personal knowledge.

LIST OF PARTIES TO JUDGMENT BELOW

1. Richard D. Lowrance, defendant-appellant below and petitioner herein.

2. Judd Hirschberg, defendant-appellant below.

3. United States of America, plaintiff-appellee below and respondent herein.

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PETITION FOR WRIT OF CERTIORARI

Mr. Richard Lowrance petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*), is reported at 988 F.2d 1509 (7th Cir. 1993).

JURISDICTION

The judgment of the court of appeals (App. B, *infra*), was entered on March 19, 1993. A timely petition for rehearing was denied on June 1, 1993 (App. C, *infra*). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Rule of Evidence 104 provides in part:

> **(a) Questions of admissibility generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . .

Federal Rule of Evidence 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

Petitioner Richard Lowrance and a co-defendant, Judd Hirschberg, were each convicted by a jury of altering or removing vehicle identification numbers, 18 U.S.C. § 511(a), and mail fraud, 18 U.S.C. § 1341. Lowrance and Hirschberg, both successful traders on the Chicago Mercantile Exchange, had long been acquainted with each other.

The convictions stemmed from the reported theft of Hirschberg's silver 1981 Mercedes Benz 380 SL on October 23, 1984 on the North Side of Chicago. Mr. Hirschberg later received a $43,300 insurance settlement for the theft. (Tr. 249-254; 988 F.2d at 1510). The Mercedes was

seized by Miami, Florida police on September 1, 1988, after the vehicle identification number ("VIN") had been switched. (988 F.2d at 1510-11). At the time of seizure, the vehicle was registered, under the new VIN, to Mr. Lowrance's mother, with Mr. Lowrance designated as a lienholder. (Tr. 310-22, 389-90; 988 F.2d at 1511).

In the late afternoon on September 1, Campbell, a Miami auto theft detective reached Hirschberg by phone at the home of Hirschberg's girlfriend in Colorado and told him that his car had been recovered in Richard Lowrance's possession and registered in Lowrance's mother's name. (Tr. 687-689). Hirschberg responded that he knew Lowrance from the Chicago Mercantile Exchange, that they had a social relationship, and that Lowrance was a successful multi-millionaire trader. The conversation concluded with Hirschberg's promise to have Lowrance call Campbell. (Tr. 729).

Although a stipulated telephone record showed a telephone call from Mr. Lowrance's office to the Miami Police Department on September 2, Campbell denied that he, or any other Miami police officer, spoke with Mr. Lowrance on September 2. The call lasted 8.5 minutes and was placed to the number on Campbell's business card which he gave the day before to Eddie Yoshimura, a friend of Lowrance's who was driving the Mercedes when it was seized. (Tr. 532, 533, 758-62, 1232). Campbell testified that he did not speak with Lowrance until September 14. He stated that between September 2 and 14, he did nothing to contact Mr. Lowrance. (Tr. 758).

Campbell testified that on September 1 and 2, 1988, he kept all his files and reports (including those relating to the seizure of the Mercedes on September 1) in a big cardboard box which he carried with him, at all times, even

when he left his desk momentarily. (Tr. 690). He claimed that this protectiveness was necessary because he was investigating other Miami police officers.

Immediately after Mr. Lowrance's 2:47 p.m. phone call to Campbell's number at the Miami Police Department on September 2, he called Mr. Hirschberg at 2:56 p.m. (Tr. 1232). The government theorized that because only Campbell at Miami Police knew about the Hirschberg connection to the seized car—the files all being in Campbell's box—Mr. Lowrance's call to Hirschberg in Colorado demonstrated guilty knowledge. (Tr. 153, 1336).

According to Campbell, he first spoke to Mr. Lowrance on September 14 when Lowrance responded to a message Campbell left earlier that day on Lowrance's answering machine. (Tr. 690-92, 698). Mr. Lowrance's September 14 call was to the same phone number as his September 2 call. Campbell testified that he told Mr. Lowrance the Mercedes was earlier reported stolen by Hirschberg.

At trial, Mr. Lowrance intended to introduce evidence of his wealth to show absence of motive. During voir dire, Mr. Lowrance requested that the district court pose a single question to potential jurors concerning their possible bias against the wealthy. The district court refused, and the Court of Appeals upheld that refusal. 988 F.2d at 1514-15. The appeals panel held that the district court did not abuse its discretion in omitting the question because the possibility of anti-wealthy bias was speculative, the wealthy were not a "suspect classification," and the "practical realities" prevented the district court from asking all voir dire questions tendered by the parties. 988 F.2d at 1515.

In an effort to impeach Campbell's testimony, Mr. Lowrance sought to present the expert testimony of a

Schaumburg, Illinois auto theft detective, Robert Stachnik. Stachnik, a 21-year veteran of the Schaumburg force including 18 years in auto theft, would have testified that he had never heard of an auto theft detective, or any other type of detective, carrying around all of his active files around with him, as Campbell claimed he had. According to Stachnik, other, more practical means were available to secure files concerning investigations against fellow police officers. In addition to his general knowledge of auto theft investigation practices, Stachnik was familiar with police practices in Florida and Illinois.

The district court barred Stachnik's proffered expert testimony, although Stachnik was allowed to testify as a non-expert concerning relevant aspects of a Mercedes Benz theft investigation he had conducted. The Seventh Circuit held that district court had not abused its discretion in excluding the expert testimony because Lowrance had supposedly failed to seek qualification of Stachnik as an expert, and Stachnik supposedly lacked knowledge of Miami police practices and did not know Campbell. 988 F.2d at 1513-14.

REASONS FOR GRANTING THE PETITION

I.

The Seventh Circuit's No-Bias-Against-the-Wealthy Presumption Violated the Defendant's Sixth Amendment Right to Discover and Seek Removal of Jurors Who Were Not Impartial.

The Seventh Circuit in essence held that questioning prospective jurors about their possible biases against wealthy persons is per se, presumptively unnecessary. That ruling is contrary to both the Sixth Amendment right to trial before an impartial jury and this Court's

precedents, which provide that defendants must be afforded a reasonable opportunity to discover potential jurors' relevant prejudices and to exercise peremptory challenges.

In rejecting Mr. Lowrance's claim that there was a reasonable possibility of prejudice against him because of his wealth, the Court of Appeals mistakenly relied on authority holding that the wealthy are not a protected class for strict scrutiny/equal protection purposes. That authority is irrelevant to Sixth Amendment analysis.

If allowed to stand, the Seventh Circuit ruling would undermine Sixth Amendment rights nationally, serving as an unwarranted shield against simple voir dire inquiries that would expose jurors biases against the wealthy, among other classes of defendants.

Under the Sixth Amendment, criminal defendants in federal court are entitled to trial before a jury comprising " 'impartial, 'indifferent' jurors.' " *Morgan v. Illinois*, 504 U.S. ____, 119 L.Ed.2d 492, 501 (1992) (quoting *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961)). The jury's verdict must be based on the evidence at trial, " 'regardless of the heinousness of the crime charged, the apparent guilt of the offender *or the station in life which he occupies*.' " *Id.*, 119 L.Ed.2d at 501 (quoting *Irvin*, 366 U.S. at 721-22) (emphasis added).

Included within the right to trial by an impartial jury is the right to adequate voir dire to reveal unqualified jurors. *Id.*, 119 L.Ed.2d at 503 (citing *Dennis v. United States*, 339 U.S. 162, 171-72 (1950); *Morford v. United States*, 339 U.S. 258, 259 (1950)). " 'Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot

be fulfilled.' " *Id.* (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (White, J., plurality opinion)).

Moreover, " '[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.' " *Morford*, 339 U.S. at 259 (quoting *Dennis*, 339 U.S. at 171-72). Adequate voir dire is also important to enable defendants to fully exercise peremptory challenges to the extent such challenges are available. *Mu'Min v. Virginia*, 500 U.S. ____, 114 L.Ed.2d 493, 509 (1991); *Rosales-Lopez*, 451 U.S. at 188 (White, J., plurality opinion).

Mr. Lowrance intended to introduce evidence of wealth to show absence of motive. To guard against the inevitable resentment this evidence would evoke in susceptible jurors, the district court was asked to pose to the jury a single voir dire question pertaining to possible bias against the wealthy.[1] Despite the relevance and simplicity of the question, the court refused to make the inquiry.

The Court of Appeals affirmed on the grounds that (1) the district court asked more than a hundred questions,[2] (2) "[t]he practical realities of trial do not allow the district court to ask all tendered questions," and (3) there was no need to ask "about speculated bias against the wealthy." (988 F.2d at 1515). That court, in effect, applied a per se presumption that prospective jurors were not biased against the wealthy; a presumption that violated

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[1] The question about possible bias against the wealthy was one of only 18 voir dire questions which Mr. Lowrance submitted to the district court.

[2] Some of the questions came from Mr. Lowrance's co-defendant, but the majority were boilerplate questions posed by the court and routinely asked in every criminal case.

both Mr. Lowrance's Sixth Amendment right to an adequate voir dire, *Morgan*, 119 L.E.2d at 503, and the longstanding judicial recognition of anti-wealthy bias. *See, e.g., United States v. Socony-Vacuum Oil*, 310 U.S. 150, 237-239 (1940) (condemning prosecutor's appeal to jurors' prejudice against "influential, wealthy millionaires or billionaires"); *Goff v. Commonwealth*, 241 Ky. 428, 44 S.W.2d 306, 308-09 (1931) (condemning prosecutor's argument to jury that defendants were "stock traders who are able to pay fat [legal] fees").

Although trial judges are afforded a great deal of discretion in supervising voir dire, exercise of that discretion is " 'subject to the essential demands of fairness.' " *Morgan*, 119 L.Ed.2d at 503 (quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931)). *See also Mu'Min*, 114 L.Ed.2d at 506 (test for whether particular voir dire questions are constitutionally required is fundamental fairness, not mere helpfulness). "In exercising its discretion, the trial court must be zealous to protect the rights of an accused." *Dennis*, 339 U.S. at 168. Furthermore, this Court has greater leeway under its supervisory power in setting voir dire standards for federal trials, such as in this case, than for state court trials governed by the Fourteenth Amendment. *Mu'Min*, 114 L.Ed.2d at 505.

As the Seventh Circuit has recognized, to be adequate, the voir dire must be designed "to uncover bias as to issues in the case and as to the defendant himself." *United States v. Crockett*, 979 F.2d 1204, 1216 (7th Cir. 1992). It "must also provide the defendant the information necessary to exercise his right to peremptory challenges." *United States v. McAnderson*, 914 F.2d 934, 942 (7th Cir. 1990). *Accord, Mu'Min*, 114 L.Ed.2d at 509; *Rosales-Lopez*, 451 U.S. at 188 (White, J., plurality opinion).

Refusing to make *any* inquiry about bias against the wealthy in a case involving an exceptionally wealthy defendant, whose defense rested in large part upon his wealth as showing a lack of motive, heard by a jury of very modest means, is contrary to the "essential demands of fairness" required by cases such as *Morgan*, 119 L.Ed.2d at 503 and *Aldridge*, 283 U.S. at 310, and scarcely creates a reasonable assurance that the particular prejudice involved would be discovered. *United States v. Gillis*, 942 F.2d 707, 709-10 (7th Cir. 1991); *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

Mr. Lowrance's constitutional right to an impartial jury was nullified by his inability to discover the jurors' relevant prejudices through voir dire. *Morgan*, 119 L.Ed.2d at 506. The district court could have substituted its own questions for those submitted by the defendant regarding anti-wealthy bias. Instead it failed to ask any questions of the prospective jurors "which could be deemed to cover the subject." *Aldridge*, 283 U.S. at 311; *accord*, *Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (discretion as to form of voir dire inquiry, but some inquiry mandatory).

Unlike the situation in *Rosales-Lopez*, 451 U.S. at 192-93 (White, J., concurring opinion), there were no questions asked during the voir dire which would expose "special circumstances" or "external circumstances" that might have raised a "reasonable possibility" of juror bias.

In sanctioning the district court's blanket refusal to make any inquiry even related to the subject of wealth, the court below created an impossible requirement: Mr. Lowrance was required to prove bias before being allowed to determine its existence. The Seventh Circuit's presumption of an absence of bias against the wealthy is contrary to this Court's precedents.

The general existence of bias against wealthy persons is not mere speculation, contrary to the Seventh Circuit's opinion, 988 F.2d at 1515. The class struggle which has dominated the whole course of history bears witness to the bias that many have against the wealthy. Justice Holmes long ago noted "[t]he unfortunately growing hatred of the poor for the rich". SPEECHES, 56-57 (Little Brown 1934). That bias is traceable to Biblical times. It was not because the mass of men revered the rich that Matthew observed that "it is easier for a camel to go through the eye of a needle, than for a rich man to enter into the Kingdom of God." Matthew 19:24. Indeed, so indement was the bias against the wealthy that the Old Testament found it necessary to admonish, "Curse not the rich in thy bedchamber. . . ." Ecclesiastes 10:20. Ignoring this admonition, many politicians have won office by appealing to class prejudice.

Class bias against the wealthy has also been recognized in many cases, in addition to *Socony-Vacuum*, 310 U.S. 150, 237-239, and *Goff*, 241 Ky. 428, 44 S.W.2d 306, 308-09, cited above. *See Sizemore v. Fletcher*, 921 F.2d 667, 670-71 (6th Cir. 1990) (criminal conviction reversed because of improper prosecutorial appeals to "wealth and class biases"); *United States v. Stahl*, 616 F.2d 30, 32 (2d Cir. 1980) (reversal of conviction because prosecutor argued that defendant was a "multi-millionaire" whose life was "geared to make money in real estate, money, money, money" and whose crime was the result of greed); *United States v. Nill*, 518 F.2d 793, 803 (5th Cir. 1975) (reversal because prosecutor emphasized defendant's wealth and financial ambitions on cross-examination; "If a defendant had been subjected to such an irrelevant, derogatory attack upon his poverty, no court would tolerate it. The rule works both ways. The well to do are entitled to the same fair treatment.").

The Seventh Circuit's additional reasons for rejecting Mr. Lowrance's voir dire claim—the district court asked a lot of questions, and could not ask all questions submitted—should be given no weight. No decision of this or any other court of which we are aware has held that the adequacy of voir dire is to be determined by tallying the number of questions posed to the jury. Further, a trial court's need to pare down the number of questions to be asked does not allow it to brush aside those which are essential to discovering relevant and possible biases or are necessary to exercising peremptory challenges. "[E]xpedition is clearly subsidiary to the duty to impanel an impartial jury." *Dellinger*, 472 F.2d at 370 n.42. *Accord*, *United States v. Ewell*, 383 U.S. 116, 120 (1966) (largely because of defendant safeguards, criminal procedures "are designed to move at a deliberate pace"); *United States v. Walters*, 913 F.2d 388, 393 (7th Cir. 1990) (judicial efficiency does not warrant sacrificing a defendant's right to a fair trial); *Gavino v. MacMahon*, 499 F.2d 1191, 1196 (2d Cir. 1974) (same).

The Seventh Circuit's presumption that prospective jurors are not biased against the wealthy, and applying that presumption to foreclose the need to probe for possible bias of that sort, raises an important Sixth Amendment issue which this Court should address.

II.

The Seventh Circuit Unfairly Narrowed the Scope of Federal Rule of Evidence 702 in Upholding the Exclusion of an Expert Witness Offered by Petitioner.

The Seventh Circuit misread the record in finding that the defense had failed to seek qualification of a witness, an Illinois auto theft detective, as an expert. That court

also misapplied Federal Rule of Evidence 702 in finding that the rule did not authorize the detective's proffered testimony. In the latter regard, the Seventh Circuit held that the detective, Robert Stachnik of the Schaumburg, Illinois police, was properly barred from testifying as an expert because he lacked *personal* knowledge of the matter at issue, even though Rule 702 encompasses no such personal-knowledge requirement. The appeals panel thereby contravened Rule 702 and unfairly restricted Mr. Lowrance's defense on a key issue in violation of his Fifth Amendment right to due process.

The Federal Rules of Evidence "anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder. . . ." *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983). The relevance standard enunciated in Fed. R.Evid. 401 "is a liberal one." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. ____, 125 L.Ed.2d 469, 479 (1993). Moreover, under Fed.R.Evid. 702, "an expert is permitted wide latitude to offer opinions, including those that are *not based on first-hand knowledge or observation.*" *Daubert*, 125 L.Ed.2d at 482 (emphasis added).

Stachnik's expert testimony was offered to impeach a key prosecution witness—John Campbell, the Miami auto theft detective who seized the stolen Mercedes in Miami on September 1, 1988. (988 F.2d at 1511, 1513). By virtue of his 21 years as a police officer, including 18 as an auto theft detective, Stachnik had "special skill, knowledge, [and] experience" which made his view of Campbell's asserted files handling helpful to the jury. Fed.R.Evid. 702.

It was undisputed that on September 2, Mr. Lowrance made an 8.5 minute call to the Miami Police Department using the phone number on Campbell's business card. Immediately thereafter, Mr. Lowrance called Hirschberg in

Aspen. The government's theory that this call *necessarily* proved a conspiracy between Hirschberg and Lowrance was dependent upon the jury's acceptance of Campbell's testimony that he had not spoken with Mr. Lowrance on September 2, *and* that no one else in the Miami Police Department could have informed Mr. Lowrance about Hirschberg's relationship to the seized car. Campbell insisted that the file on the Mercedes, which reflected Hirschberg's ownership, *like all his files*, was never out of his sight. He claimed that he carried his files with him in a cardboard box even when he momentarily left his desk. (Tr. 690, 752-53).[3]

The testimony was critical to the prosecution and defense alike, as the Seventh Circuit panel recognized. (988 F.2d at 1513). If believed, Campbell's testimony helped prove the government's conspiracy theory, as the appeals panel acknowledged, *id.*, and as the government vigorously argued. (Tr. 153, 1336, 1444, 1448). But if Campbell's testimony were disbelieved, or at least doubted, the government's case may well have foundered.

Nonetheless, the district court refused to allow Stachnik to testify that he did not know and had never heard of any auto theft or other kind of detective in Miami or elsewhere who carried all of his active files with him in a box. (Tr. 1187-88, 1191-92, 1292).

The Seventh Circuit sustained this exclusion on two bases, both of which we respectfully submit misconstrued the record and are at odds with basic principles of rele-

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[3] Campbell claimed that he did not speak to Mr. Lowrance until September 14, at which time he claimed Lowrance made various false and incriminating statements.

vancy under Rule 401 and the expansive principles of admissibility of expert testimony under Rule 702.

First, the appeals panel held that Rule 702 was inapplicable because Mr. Lowrance did not seek to qualify Detective Stachnik as an expert. (Slip op. 8). The record does not support this conclusion, which also ignores this Court's holding in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). See note 6 infra. Page 1188 of the transcript, on which the Panel relied, reflects that we informed the court that Detective Stachnik would testify about an investigation he conducted involving Mercedes Benz 450's,[4] *and* that he never heard of any officer carrying his files with him in a box. It was in connection with the former aspect of Stachnik's testimony that we said he was not offered as an expert. He was offered as an occurrence witness to what he had observed during the investigation. The transcript makes clear that the government and the court understood that as to the latter aspect of the testimony—the impeachment of Campbell—he was being offered as an expert. *Immediately* following the explanation of why the impeachment of Campbell was critical, the government responded,

> the latter part [referring to the proposed impeachment] is clearly inadmissible. His *expertise* does not go to, you know, how they carry things and its a collateral matter. *As to the other thing* [referring to the investigation], Judge, I think it's one thing to intro-

[4] The investigation revealed that the stolen car operation went on for more than a year and was openly conducted out of the defendant's home. The purpose of the testimony was to counteract the government's proof that Lowrance's acquisition of a duplicate title to the Mercedes Benz 450 (which provided the VIN tags for the Hirschberg Mercedes) could not have innocently taken place since thieves are never around for an innocent purchaser to recontact.

> duce expert testimony as to generally how thieves operate. But just to call him—(Tr. 1188) (emphasis supplied).

It was in connection with this statement that Mr. Lowrance's counsel interjected, "he's not testifying as an expert." *Id.* That the court understood that this disavowal was directed only to that portion of the testimony dealing with the investigation is apparent from the colloquy occurring three pages later, to which the Panel made no reference:

> [THE COURT:] *I'm not going to allow him to testify as any kind of an expert on what police officers do with their files. He doesn't know what Miami does. I don't think he does anyway.*
> MR. COLE: *He says he does.*
> THE COURT: *Well, beyond that,* Campbell offered a particular reason for keeping that file unto himself or those files. He was investigating brother officers of the Miami Police Department or Miami-Dade or whatever it is. And I think to offer an opinion generally on the subject of how officers throughout the United States carry their files isn't *helpful* when the specific fact circumstance is presented as to why this happened in this context. So I don't think the jury is going to be *helped* by some *opinion* generally about what officers do under usual circumstances. Campbell made clear that the reason or the principal reason he did that was because unfortunately he was looking at other officers on occasions, and he didn't want anybody snooping through his files. *And we're going to have to be content with that.* So he can't testify to that. (Tr. 1191) (Emphasis supplied).[5]

[5] The court's statements clearly demonstrate that his ruling excluding the testimony was necessarily based on his acceptance of the truthfulness of Campbell's testimony. This begged the very

(Footnote continued on following page)

The district court's repeated references to and emphasis on helpfulness, following his statement that he would not "allow [Stachnik] to testify as any kind of an *expert* on what police officers do with their files", makes clear that he understood Stachnik was being offered as an expert on the question of the manner in which auto theft detectives maintain their files.[6]

Equally erroneous was the Seventh Circuit's alternate rationale that Detective Stachnik did not qualify as an

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[5] *continued*

question to be decided by the jury and impermissibly usurped its factfinding function. It constituted a glaring violation of Rule 104, Fed.R.Evid., which does not allow district courts to make credibility determinations in determining admissibility of evidence. *See Huddleston v. United States*, 485 U.S. 681, 690 (1988); *United States v. Hudson*, 884 F.2d 1016, 1020 (7th Cir. 1989), *cert. denied*, 496 U.S. 939 (1990); *United States v. Russell*, 919 F.2d 795, 797 (1st Cir. 1990); *Western Industries, Inc. v. Newcor Canada Limited*, 739 F.2d 1198, 1202 (7th Cir. 1984).

[6] It is inconsequential that the defense did not utter the precise words "we offer Detective Stachnik as an expert." The purpose of the offer was obvious from the context, as borne out by the district court's comments and his focus on helpfulness, a concept unique to admissibility of *expert* testimony. *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991). The Supreme Court has stressed that where the purpose of proffered testimony is "obvious from the context", even counsel's misdescription of that purpose is irrelevant. It has recognized that in the heat of a trial, counsel frequently may not explain the evidentiary basis of an argument as might ideally be desired. However, it is enough if the court is adequately apprised of counsel's intent—as the district court clearly was here. Often, as here, the judge's response demonstrates the adequacy of the argument. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 173-175 (1988). This Court has also emphasized that a formal offer of proof is not necessary " 'if the record shows, either from the form of the question asked, or otherwise, what the substance of the proposed evidence is.' " *United States v. Sweiss*, 814 F.2d 1208, 1211 (7th Cir. 1987). *Accord United States v. Alden*, 476 F.2d 378, 381 (7th Cir. 1973).

expert because "[he] had no knowledge of police practices in Miami. . . ." (988 F.2d at 1514). The record makes clear that when the court expressed concern that Detective Stachnik "doesn't know what Miami does," the defense made an offer of proof that he would testify that he *was* familiar with Miami detective practices. (Tr. 1191).[7]

Although both the district court and Seventh Circuit mistakenly assumed that Stachnik did not know about Miami police practices, those courts also erred in imposing such a requirement. Rule 702 only requires expertise in a specific subject, not necessarily knowledge of the specific geographic area involved in the case. Therefore even if Stachnik did not know about Miami police procedures

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[7] Even if Detective Stachnik had been unfamiliar with Miami practices, his exclusion as an expert was improper. This was a matter related only to the weight to be given his testimony. *See Boleski v. American Export Lines, Inc.*, 385 F.2d 69, 72 (4th Cir. 1967) (expert witness generally familiar with safety practices allowed to testify and "jury could determine what weight to give to his testimony, taking into consideration the fact that he was unfamiliar with practices in the Baltimore area"); *Wilder Enterprises v. Allied Artists Pictures*, 632 F.2d 1135, 1143 (4th Cir. 1980) (improper to exclude expert because of unfamiliarity with Norfolk-Virginia Beach market absent evidence that activities which were the subject of expert testimony varied according to geographic location); *Knight v. Otis Elevator Co.*, 596 F.2d 84 (3d Cir. 1979) (witness allowed to testify as expert about elevator design defect, despite his not having examined the elevator and lack of specific background in design and manufacture of elevators). The district court allowed Miami officer Smylie to testify as an expert about auto theft in Illinois based merely on his word to have had been involved in investigations of thefts of Chicago automobiles. (Tr. 557-60). Detective Stachnik's proffered familiarity with Miami practices should have been no less sufficient for purposes of expert qualifications. *Compare United States v. Selig*, 622 F.2d 207, 216 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980) (Error to preclude testimony of defendant's procedural expert who "was as qualified as" the prosecution's expert).

(contrary to the offer of proof concerning his testimony), his knowledge of auto theft investigation, and other police investigatory techniques, made his expertise relevant and his testimony admissible.

Moreover, any perceived weaknesses in Stachnik's testimony based on a supposed lack of familiarity with Miami, or because Stachnik did not know Campbell, or any other potential weaknesses, could have been explored on cross-examination. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 125 L.Ed.2d at 484 (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)). Stachnik's familiarity with Miami police practices simply made the Seventh Circuit's error that much clearer.

The fact that he "did not know Campbell" (988 F.2d at 1514) is legally inconsequential. While personal familiarity would have qualified Stachnik to impeach Campbell's testimony as a *non-expert* (*see* Rules 602, 701), it was not the only basis on which his testimony could be bottomed. Knowledge of auto theft and other police investigatory practices, or knowledge of Miami practices were equally sufficient bases and qualified Detective Stachnik as an *expert* under Rule 702, which required admission of his testimony, so long as it was relevant under Rule 401—which it clearly was.[8]

[8] The Panel's requirement of personal knowledge would limit the spectrum of witnesses to those who would never controvert Campbell's claimed practice—his colleagues. *See DeSilva v. American Brands, Inc.*, 845 F.2d 356, 361 (1st Cir. 1988) (rejecting claim that only mechanical engineers with design experience with specific machine in question could testify since "[s]uch an approach would often mean that the only experts who could testify regarding a machine are those who have an interest in defending the design.").

Under Rule 401, the threshold for admissibility is exceedingly low. *Daubert*, 125 L.Ed.2d at 479; *United States v. Murzyn*, 631 F.2d 525, 529 (7th Cir. 1980); 4 Weinstein's Evidence, ¶401[06], at 401-39 (1991):

> Relevant evidence means evidence having *any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or *less probable* than it would be without the evidence. Rule 401 (Emphasis supplied).

Evidence tending to make a fact "less probable" is as relevant as evidence tending to make it "more probable", Weinstein, *supra*, ¶401[07], at 401-48, and "the cases reflect a liberal attitude toward the range of evidence that may be admitted for purposes of impeachment." *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir. 1981). *See also United States v. Stone*, 471 F.2d 170, 172 (7th Cir. 1972).

The Seventh Circuit's sanctioning of the exclusion of Detective Stachnik's proposed—and critically impeaching—testimony was an extreme departure from the plain language of Rule 401 and from the consistent holdings of that circuit. *Western Industries, Inc. v. Newcor Canada Limited*, 739 F.2d 1198, 1202 (7th Cir. 1984) reversed a verdict because the trial court had refused to allow an expert to testify that manufacturers giving disappointed buyers consequential damages was "unheard of in their trade." *United States v. Platt*, 435 F.2d 220 (7th Cir. 1970), *cert. denied*, 402 U.S. 913 (1971), held that it was proper for an attorney with 5½ years of experience involving 125 to 154 foreclosures, to testify that a certain motion to intervene was the only one of its kind he had ever seen. *Id.* at 224. *Cf. Romero v. International Terminal Operating Company*, 358 U.S. 354, 370 (1959) ("Negative testimony is often as compelling as bits of affirmative evidence.").

The exclusion of Detective Stachnik's testimony is also contrary to the uniform holdings of various courts of appeals which have stressed that "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony." *Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir. 1991). *See also, Krist v. Eli Lilly & Co.*, 897 F.2d 293, 298 (7th Cir. 1990) ("the rule on expert testimony is notably liberal"); *Western Indus. Inc. v. Newcor Canada, Ltd., supra*; *Habecker v. Copperloy Corp.*, 893 F.2d 49, 51 (3d Cir. 1990).

The Rule "was intended to function as a broad rule of admissibility." *Arcoren*, 929 F.2d at 1239. Doubts about the usefulness of expert testimony should be resolved in favor of admissibility. 3 Weinstein, *supra*, ¶ 702[02] at 702-30; *United States v. Jakobetz*, 955 F.2d 786, 797 (2d Cir. 1992). Detective Stachnik was familiar with the practices of auto theft detectives in Florida and Illinois; he had been a police officer for 21 years and he, like the attorneys in *Platt* and *Newcor*, would have testified to the unheard nature of Campbell's claimed practice. He clearly had the "specialized knowledge . . . by knowledge, skill, experience, training, or education," to qualify as an expert and his testimony would have assisted "the trier of fact to understand the evidence or to determine a fact in issue. . . ." Rule 702.

The lay jurors did not have the slightest idea whether police officers in Miami or anywhere else did what Campbell claimed. For all they knew, not only was Campbell's claimed practice *not* "farfetched," it could well have been one most detectives followed. Had the jury been allowed to hear Stachnik's testimony, it could still have concluded that Campbell was not lying and that he had his own singular way of doing things. It could also have reached a very different conclusion.

The Seventh Circuit's conclusion that "the jurors were as able as [Stachnik with his 21 years of police experience] to determine whether Campbell's box theory was farfetched" is logically and factually insupportable. (988 F.2d at 1514). The jurors would have no basis, other than common sense, to question Campbell's testimony. Forcing them to rely on such uninformed common sense under these circumstances is contrary to the purpose behind Rule 702 of allowing expert testimony to assist the trier of fact.

The unduly restrictive rules for expert testimony which the Seventh Circuit applied—requiring that an expert have "personal knowledge" of the particular persons and geographic locations regarding which the expert is to provide an opinion—contravenes Rules 401 and 702, and is inconsistent with the practical needs of both jurors and defendants.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-2782 & 91-2783

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUDD HIRSCHBERG and RICHARD D. LOWRANCE,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 945—**Charles P. Kocoras**, *Judge.*

ARGUED NOVEMBER 4, 1992—DECIDED MARCH 19, 1993

Before BAUER, *Chief Judge*, CUDAHY, *Circuit Judge*, and WOOD, JR., *Senior Circuit Judge.*

BAUER, *Chief Judge.* Judd Hirschberg and Richard Lowrance were indicted and convicted of altering or removing vehicle identification numbers, 18 U.S.C. § 511(a), and mail fraud, 18 U.S.C. § 1341. They appeal their convictions. Lowrance argues that various errors in the district court warrant reversal. Hirschberg adopts Lowrance's arguments, and also argues that the evidence is insufficient to support his conviction. We affirm in part and reverse in part.

I.

Judd Hirschberg and Richard Lowrance had a lot in common. They were young successful traders at the Chicago Mercantile Exchange, they saw each other daily, socialized together, vacationed together, and drove the same car—literally; from 1985-1988, Lowrance drove a silver 1981 Mercedes-Benz 380 SL sedan ("the silver Mercedes") that Hirschberg once owned. But in 1985 Hirschberg had reported the silver Mercedes stolen and collected a $43,300 insurance settlement for it.

At some point, the silver Mercedes got a "new" vehicle identification number ("VIN"). It now had the VIN from a dark green 1974 Mercedes-Benz 450 SL two-seat convertible. Through a series of title applications using the new VIN, Lowrance was able to disguise the silver Mercedes and avoid its detection as a stolen vehicle. In September 1988, the switch was noticed by two Miami, Florida police detectives during a routine observation of vehicle numbers. The detectives knew by looking at the VIN that the silver Mercedes had been retagged. Shortly thereafter, the detectives, Campbell and Smylie, seized the car which was being driven by a friend of Lowrance's. The detectives learned that it was registered to Lowrance's mother and Lowrance was designated as the lienholder. Investigation revealed that not only was it originally Hirschberg's car, but Hirschberg's mobile telephone was inside.

On September 1, 1988, Campbell telephoned Hirschberg at his girlfriend's home in Aspen, Colorado to tell him his car had been recovered and that Lowrance was implicated in the theft. Hirschberg expressed disbelief that a friend, who was also a multi-millionaire, would have anything to do with a stolen car. Campbell asked Hirschberg for Lowrance's telephone number. Hirschberg declined to give the number and told Campbell that Lowrance would not be available for a few days, but he told Campbell that he would deliver a message. Telephone records reveal that the next day a call was placed from Lowrance's office to the Miami Police Department, but neither Smylie nor

Campbell spoke to Lowrance. Within seconds of that call, another call was placed from Lowrance's office to the Aspen location where Hirschberg was staying.

Campbell finally spoke to Lowrance on September 14. Lowrance told him that he had purchased the silver Mercedes in response to a newspaper advertisement, but he could not remember from whom he bought it, where he bought it, or how much he paid. Lowrance also told Campbell that he and Hirschberg were only business associates, and that their friendship did not extend beyond work. He claimed that he did not know that Hirschberg's silver Mercedes had been stolen.

II.

A. Richard Lowrance

Lowrance argues that his conviction should be reversed because several errors occurred at trial. The first alleged error concerns Detective Campbell's possible bias against the defendants, exhibited by Campbell's unwillingness to meet with, or talk to, defense attorneys before trial. Campbell was a prosecution witness. Before he took the stand a sidebar was held to discuss defense counsel's cross examination on the bias issue. The prosecution proffered Campbell's rehabilitation testimony on the bias issue. The testimony was not favorable to defense counsel (and perhaps the defendants). The district court determined that if defense counsel questioned Campbell about his reluctance to talk, the prosecution could question Campbell about his reasons. (Tr. 678-82). Despite knowledge that the rehabilitation testimony might be damaging, defense counsel pursued the bias issue. (Tr. 734-38).

On redirect, the prosecutor asked Campbell whether he was concerned about a "possible distortion of the situation." Campbell answered affirmatively. (Tr. 827). On recross, the defense probed further, seeking to establish that Campbell's fear of distortion was unreasonable. (Tr. 831-34). This opened the door for further redirect, and the prosecutor asked Campbell why he feared his words would

be distorted. Just before Campbell replied, the district court admonished the jury that Campbell was merely testifying to his personal state of mind and that his statements could not be accepted for the truth of the underlying assertion. (Tr. 835). Campbell then testified that because of his prior experience in thousands of court appearances, he believes that defense attorneys regularly and routinely take his words out of context, twisting and distorting them into misstatements of fact. He added that "[i]t happens every time." (Tr. 835-37).

We review the district court's decision to allow Campbell's explanatory testimony for an abuse of discretion. *United States v. Glecier*, 923 F.2d 496, 503 (7th Cir.), *cert. denied* 112 S. Ct. 54 (1991). Lowrance argues that Campbell's testimony about defense lawyers was unfairly prejudicial and warrants reversal. We have stated that "[a]ttacks on the honesty and sincerity of defense counsel are improper." *United States v. Sblendorio*, 830 F.2d 1382 (7th Cir. 1987), *cert. denied* 484 U.S. 1068 (1988). But in *Sblendorio* and the other cases Lowrance cites, the improper attacks were made by opposing counsel, not by a hostile witness.

Lowrance argues that rehabilitation evidence that justifies witness bias through the defendant's conduct may be improper. J. WIGMORE, EVIDENCE, IIIA § 952 at 799-801 (Rev. ed. 1970). Lowrance's reliance on Wigmore is misplaced because he has not established Wigmore's threshold requirement that the witness exhibit hostility toward the defendant. We do not believe Campbell was hostile to Lowrance. We acknowledge that he exhibited bias against defense attorneys generally, but Campbell neither said nor did anything to indicate that his bias against defense counsel was strong enough to impugn his testimony against the defendant. The opportunity for a witness to explain through rehabilitation has been called "a basic necessity for redirect" and "the universal balm for the wounded witness." J.W. JEANS, SR., LITIGATION, § 17.07 at 1277 (2d. ed. 1992). We will not deny the opportunity to rehabilitate without a stronger indication of hostility or bias.

Lowrance also relies on *United States v. Pintar*, 630 F.2d 1270 (8th Cir. 1980), for the proposition that damaging explanatory evidence is inadmissible. In that case, the witness was cross examined about her dislike for one of the defendants. She testified about several of the defendant's acts that she disliked. On redirect, the prosecution asked whether any other reason existed causing her to dislike the defendant. The witness' answer was very damaging—she replied that she believed the defendant (and her codefendant husband) were running an illegal kickback scheme, and she cited proof of her suspicion. The Eighth Circuit held that the testimony was unfairly prejudicial and should have been excluded because it was not relevant for a rehabilitative purpose. *Id.* at 1284.

The facts in *Pintar* are distinguishable from those here. In that case, the testimony was not appropriate for rehabilitation because it was inflammatory rather than explanatory. It introduced "other crimes" evidence against the defendants, which was improper under Federal Rule of Evidence 608(b). In Lowrance's case, Campbell explained why he distrusted defense counsel, not the defendant. The information was not inflammatory and did not introduce any evidence of Lowrance committing bad or illegal acts. Finally, unlike *Pintar*, Campbell's explanation was relevant for a rehabilitative purpose.

In *United States v. DiCaro*, 852 F.2d 259 (7th Cir. 1988), we considered a challenge to a district court's denial of a defendant's right to fully explore a witness' bias. *DiCaro* illustrates that the typical manner used by defense counsel to limit potentially damaging rehabilitation testimony is to narrowly define cross examination issues. In that case, the defense sought to introduce evidence of witness bias during cross examination. The prosecution objected to the evidence and argued that it did not clearly reveal bias. The prosecution also argued that damaging explanatory evidence would be offered to rehabilitate the witness. The court stated "[I]f I permit you to conduct the cross examination that you contemplate, I am certainly going to

permit the Government to seek to rehabilitate [the witness] here by those other suggestions." *Id.* at 262. Although the district court ruled that the testimony was admissible because as relevant for a rehabilitative purpose, the court limited the potential for bias by limiting the cross examination. *Id.* at 262. In this case, rather than limiting cross examination to prevent the damaging testimony, defense counsel continued to question Campbell, which led to the damaging testimony.

We consider three final points. First, the district court instructed the jury that Campbell's statements were representative of his state of mind, and could not be taken as true. The court's statements were designed to ensure that the defendants were not unduly prejudiced by Campbell's comments. *United States v. Abel*, 469 U.S. 45, 55 (1984). We presume that a jury obeys such admonitions. *Cf. United States v. Neely*, No. 88-1387, et al., LEXIS 1992 USAPP 30286, slip op. at 6-7 (7th Cir. Nov. 18, 1992). Second, defense counsel was not surprised by Campbell's testimony. Defense counsel knew that Campbell would be given an opportunity to explain and what that explanation would be.

The third point concerns our review. If defense counsel had not pursued the issue through a second round of cross examination, Campbell would not have delivered the knockout punch on further redirect. Those were strategic decisions. In instances when defendants attack trial counsel's strategy choices, we offer enormous deference to those choices, and we do not rely on the "perfect vision of hindsight." *United States v. Phillips*, 914 F.2d 835 (7th Cir. 1990) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)); *cf. United States v. Weston*, 708 F.2d 302, 307 (7th Cir.), *cert. denied* 464 U.S. (1983) (no evidence showing that counsel's decision to impeach witness, resulting in rehabilitation testimony concerning other crimes, resulted from negligence or ignorance rather than from informed professional deliberation). We see no reason to second-guess counsel in these circumstances. The defendants chose to proceed with the cross examination and test the district

court's discretion. The district court did not abuse its discretion. *Cf. Glecier*, 923 F.2d at 503 (management of cross examination and amount of detail to which witness is allowed to testify within trial court's wide discretion).

Lowrance also challenges Campbell's testimony regarding the telephone calls from Lowrance's office to the police station. Telephone records suggest that Lowrance called the Miami Police Department on September 2, and within seconds of that call, he telephoned Hirschberg in Aspen. At oral argument, the defense asserted that Lowrance spoke with Campbell and learned of Hirschberg's association with the silver Mercedes. In his brief, however, Lowrance's theory is that he spoke with Campbell or someone else at the Miami Police Department, who told him of Hirschberg's association with the case. (Lowrance Br. 15-22).

Campbell testified that he did not talk to Lowrance, and therefore did not tell him of Hirschberg's association with the car until September 14. The prosecution sought to establish that Campbell was the only person who could tell Lowrance of Hirschberg's association with the car because Campbell carried all his files with him in a box wherever he went. Unless Lowrance established that he had a conversation with Campbell, the calls infer "guilty knowledge"—that Lowrance knew of Hirschberg's association with the car because either he stole the car from Hirschberg, or they planned the crime together.

Lowrance sought to discredit Campbell's denial of the September 2 conversation by calling a witness who would flatten the "box theory." Apparently this strategy was to serve two purposes. The first was to show that if Campbell lied about the carrying the box, he lied about talking to Lowrance on September 2. The second was to show that the box theory was implausible, and that other officers had access to the information and could have given it to Lowrance.

The witness was an Illinois police detective specializing in auto theft who had never worked in Florida and

did not know Campbell. The witness was going to testify that he had never heard of an auto theft detective protecting his files in the manner that Campbell did. The trial court prohibited the witness from testifying on this issue. Lowrance challenges that decision under Federal Rule of Evidence 702. Rule 702, however, applies to witnesses that are qualified as experts, and the defense did not seek to qualify the witness as an expert. (Tr. 1188). Therefore, Rule 702 does not apply. Next, Lowrance argues that the testimony was relevant and should have been admitted pursuant to Federal Rule of Evidence 402. Relevancy is weighed by whether the evidence makes a fact more or less probable. Fed. R. Evid. 401. The witness' knowledge of police practices in the Chicago area does not make it more or less probable that Campbell toted his box everywhere. Although not acknowledged as such, the witness' testimony boiled down to "expert opinion." Expert opinion is gained from a "special skill, knowledge, or experience," and is a reasoned decision drawn from the witness' expertise. *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991). The witness had no knowledge of police practices in Miami and did not know Campbell. Because he had no special knowledge or experience in the manner in which a Miami Police officer protects his files, the jurors were as able as the witness to determine whether Campbell's box theory was farfetched. The district court did not abuse its discretion when barring the witness' testimony.

Lowrance raises various other claims. His argument that the prosecution misstated evidence about the mobile telephone is without merit. His next claim is that John Rasmussen, a prosecution witness, was allowed to give inadmissible testimony. Rasmussen, who was with Hirschberg the night the car was discovered missing, was asked whether Hirschberg had ever talked about the silver Mercedes and if he told him "how the car was recovered or any other details." (Tr. 219). Rasmussen stated that Hirschberg might have mentioned that the car was recovered. (Tr. 220). Lowrance objected at sidebar and moved for a mistrial and severance. Lowrance claimed that Hirschberg's silence

about Lowrance's possession of the car is not relevant because Rasmussen and Hirschberg were not close friends. Lowrance further argued that the prosecution should not have introduced the testimony because a motion was still under consideration to bar similar testimony from Hirschberg's girlfriend. Lowrance raises the same challenges here. The district court agreed that Rasmussen's testimony should not be admitted, and instructed the prosecutor to move on. The court determined that the damage from the testimony was slight, and denied the motions. The court offered to give a limiting instruction if the defense desired, but none was requested. We review these decisions for an abuse of discretion, and will reverse only on a showing of actual prejudice. *United States v. Koen*, No. 91-2267, LEXIS 1992 USAPP 32751, slip op. at 18 (7th Cir. Dec. 15, 1992).

Lowrance did not object until after the question was answered. Had the objection come sooner, the judge could have barred the testimony. Much like the cross examination discussed previously, the decision to object after the witness answered was strategic, and we will not alter questionable strategy choices because of hindsight.

Furthermore, the district court did not abuse its discretion when finding that no severance was required. Despite Lowrance's arguments to the contrary, *Bruton v. United States*, 391 U.S. 123 (1968), is not analogous to the situation here. In *Bruton*, a defendant confessed, implicating his codefendant. The information was highly incriminating, and the Court held that a substantial risk existed that the jury would not be able to ignore such damning testimony. *Id.* at 126. *Bruton* is easily distinguishable from this case; the testimony here was not a confession, it was not delivered by a codefendant, and if it implicated Lowrance in the crime at all, that implication was very minor. We agree with the district court that Lowrance was not unduly prejudiced by Rasmussen's testimony.

Lowrance also argues that the jury was biased against him because of his wealth. He claims that because he was

going to use his wealth to illustrate that he lacked motive, the district court should have questioned the jurors about whether they could give Lowrance a fair trial. The decision whether to ask particular voir dire questions lies within the district court's discretion, and we will not reverse unless that discretion has been abused. *United States v. McAnderson*, 914 F.2d 934, 943 (7th Cir. 1990). At oral argument, the defense stated that the wealthy are a suspect class and suffer greater prejudice than do racial minorities, a fact "born out by scores of cases." We expressed our skepticism, but were assured that "legions of cases" recognize this class prejudice, and those cases were "set forth and discussed at length in the brief." Try as we might, we find no cases in the defendant's brief or in our research that identify the wealthy as a suspect class. We do, however, find cases that state that wealth is not a suspect classification. *See Maher v. Roe*, 432 U.S. 464, 471 (1977) (financial need alone does not identify a suspect class for equal protection purposes); *see also San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (Court unwilling to identify "suspect class" based on income). The district court considered more than 100 questions submitted by the defense. The practical realities of trial do not allow the district court to ask all tendered questions. The court did not abuse its discretion by omitting a question about speculated bias against the wealthy.

Along that same line, Lowrance argues that the prosecutor improperly played upon class bias in his rebuttal by arguing Lowrance's wealth to the not-so-wealthy jury. Because the defense did not object to these remarks, we review for plain error, considering whether a fundamental miscarriage of justice occurred. *United States v. Young*, 470 U.S. 1, 15 (1985); *United States v. Badger*, No. 903223, et al., LEXIS 1993 USAPP 996, slip op. at 20 (7th Cir. Jan. 21, 1993). Lowrance argues that *United States v. Stahl*, 616 F.2d 30, 31-33 (2d Cir. 1980), instructs that persistent appeals to class prejudice against the wealthy are improper, and therefore Lowrance's conviction should be reversed. In that case, the prosecutor went out of his way

to emphasize the defendant's wealth, and stressed that the defendant's greed and love of money are what caused him to commit the crime. The district court stated that the prosecutor impermissibly equated success, affluence and business drive with greed and corruption. *Id.*

The prosecutor's treatment of Lowrance did not match the prosecutor's conduct in *Stahl*. Here, the defense argued that Lowrance was wealthy and lacked motive to commit the crime. In response, the prosecution argued that just because Lowrance was wealthy did not mean he did not commit the crime. The prosecution's theory of the case was that Lowrance was arrogant and simply flaunting the law. During closing, the prosecution argued that the law should apply equally to people at all economic levels: rich, poor, or middle class. This argument is different from the one which was held improper in *Stahl*. There, the prosecutor stressed that the defendant committed the crime (paying a bribe) because of the overwhelming long term financial benefit that would fulfill the defendant's greedy desires—desires illustrated by the wealth and business success he had already achieved. *Id.* The prosecutor did not emphasize Lowrance's wealth to a degree that wrought a miscarriage of justice. Plenty of evidence existed to establish Lowrance's role in the crime, most notably the silver Mercedes, the mobile telephone, and the various title documents altering the registration information. (Govt. Exh. B). Lowrance is not a victim of plain error.

Lowrance's final issue concerning wealth is the district court's decision not to instruct the jury on absence of motive. We will not interfere with the district court's choice of jury instructions if the issues are treated fairly and adequately. *United States v. McNeese*, 901 F.2d 585, 607 (7th Cir. 1990). Here, the defense sought to use wealth to illustrate lack of motive. Motive is not an essential element of a crime, however, and we do not believe that the jury must be given an absence of motive instruction whenever it is requested. The trial provides ample opportunity for the defense to establish and argue lack of

motive. Nothing here indicates that the jury was not adequately and fairly instructed.

Last, Lowrance claims he was sandbagged by the prosecution. In the opening statement, the defense told the jury that no narcotics were found in the silver Mercedes, and therefore the police were not justified in keeping the car and tearing it apart. Campbell was cross examined about this issue, and testified that traces of drugs were found in the car. He acknowledged that a report reflected this information, although the defense knew nothing of it. (Tr. 793-97). At that time, the report was produced from Campbell's briefcase which was sitting on the prosecution table. Lowrance claims that the prosecution knew he would be arguing the fact that no drugs were found in the car, and knew that the report refuted this testimony. He argues that the inaccuracy seems to support Campbell's earlier allegations that defense attorneys distort information, and further prejudiced the jury against Lowrance. In response, the prosecution claims they did not know that the report existed until the moment it was produced at trial, and that the report was not material to the defense.

The defense has not shown that the prosecution had the report and failed to turn it over to them. *See United States v. Brimberry*, 803 F.2d 908, 913 (7th Cir. 1986), *cert. denied* 481 U.S. 1039 (1987) (appropriate to consider whether prosecution acted in bad faith when the materiality of the evidence has not been determined). In addition, the testimony did not implicate Lowrance in illegal drug dealings. Although he "owned" the car, Lowrance was in Chicago and the car was in Miami. The testimony was clear that the car was at the disposal of Lowrance's girlfriend and others. No evidence links Lowrance with the traces of narcotics. In addition, the narcotics search was mentioned only in passing during defendant's opening statements, and the issue was completely peripheral to the case.

B. Judd Hirschberg

Hirschberg adopts all of Lowrance's arguments raised on appeal, but they benefit him no more than they did Lowrance. Hirschberg also challenges the sufficiency of the evidence supporting his conviction. He faces a difficult task because he must show that when considering the evidence in the light most favorable to the government, no rational juror could find beyond a reasonable doubt that the elements of the crime had been fulfilled. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

To prove mail fraud, the government must show that the defendant participated in a scheme to defraud and used the mail to execute or attempt to execute that scheme. 18 U.S.C. § 1341; *Koen*, slip op. at 6. Circumstantial evidence may be the sole support for the conviction. *United States v. Badger*, Nos. 90-3223, et al., slip op. at 8 (7th Cir. Jan. 21, 1993). The evidence showed that Hirschberg was a close friend and business associate of Richard Lowrance both before and after the silver Mercedes was reported stolen. The evidence also showed that Hirschberg benefitted from the incident. He collected $43,300 from his insurance company for the replacement cost of the car, several thousand dollars more than what he would have received if he sold the car. He also tried to recover insurance proceeds for the mobile telephone. Last, telephone records revealed that a call was placed from Lowrance's office to the Miami Police and immediately following that call, another was placed to the Aspen location where Hirschberg was staying. The inference taken in the light most favorable to the government is that Lowrance called Hirschberg to get their stories straight. On the whole, the evidence is sufficient to sustain his conviction.

Despite establishing mail fraud, the government has produced no evidence linking Hirschberg to the VIN undertaking. Therefore, we cannot find as a matter of law that Hirschberg's VIN conviction was supported by sufficient evidence.

III.

Hirschberg and Lowrance had better luck with arbitrage than they did with crime. Lowrance's conviction is AFFIRMED in all respects, and Hirschberg's mail fraud conviction is AFFIRMED. Hirschberg's conviction for altering the vehicle identification number, however, is REVERSED. Hirschberg's case is REMANDED to the district court for resentencing in the light of this reversal.

CUDAHY, *Circuit Judge*, dissenting in part. The case against Lowrance is persuasive and his evidentiary objections ill-founded (as the majority demonstrates). But the mail fraud case against Hirschberg is so extraordinarily thin as to require reversal of his conviction and a new trial.

The crucial and damning evidence against Hirschberg was the possession by Lowrance of one of Hirschberg's original car keys, i.e., a key furnished to him by the manufacturer. This was obviously very potent evidence. Unfortunately, the government discovered after the trial had started that the key in Lowrance's possession was *not* one of the originals provided by the manufacturer. This discovery wiped out most of the case against Hirschberg.

After the loss of the "key" evidence, the government was left with only three contentions upon which to rely: (1) Hirschberg and Lowrance knew each other well, before the disappearance of the car; (2) Hirschberg told the police he had left the doors of the car unlocked before it vanished; and (3) immediately after Lowrance spoke to the Miami police, a call was placed from Lowrance's phone to an apartment in Colorado belonging to Hirschberg's girlfriend. Of these, the first contention smacks of guilt by association. Mere association with people engaged in criminal conduct is itself no basis for conviction. *Cf. United States v. Williams*, 798 F.2d 1024, 1028 (7th Cir. 1986) (mere association with conspirators is not even "slight evidence" that

defendant was a member of the conspiracy). A prior relationship between alleged schemers could buttress an inference, well-supported by other evidence, that they engaged in a criminal enterprise.[1] But the paucity of the other evidence against Hirschberg is such that the jury's verdict could only rest upon the following syllogism: Lowrance is guilty, Lowrance knew Hirschberg, therefore, Hirschberg is guilty.[2] This reasoning is antithetical to the principle that guilt in a criminal proceeding is "individual and personal." *Kotteakos v. United States*, 328 U.S. 750, 772 (1946).

The second piece of evidence upon which the government relies, Hirschberg's statement to the police that he left the doors to his car unlocked the night it was taken, is as consistent with innocence as with guilt and thus proves nothing. *United States v. Delay*, 440 F.2d 566, 568 (7th Cir. 1971) ("Where the evidence as to an element of a crime is equally consistent with a theory of innocence as with guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt."). The government contends that this statement by Hirschberg links him to the crime because it was an attempt by Hirschberg to distance himself from the theft. But it is, of course, equally possible that the car was stolen, either by Lowrance acting alone

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[1] Total strangers, of course, could not scheme together in violation of the mail fraud statute. But a preexisting relationship could facilitate a criminal scheme. Thus, the existence of a relationship between two or more people which antedated alleged criminal activity might make it marginally more probable that they later became part of such a collective criminal undertaking.

[2] The government's argument that Hirschberg and Lowrance must have been scheming together because they remained on friendly terms after the car disappeared makes little sense. Assuming Lowrance, either alone or with others, did in fact steal Hirschberg's car, Hirschberg, of course, would not be privy to this information and would have no reason to alter his relationship with Lowrance. And Lowrance would also attempt to preserve the status quo so as to not arouse Hirschberg's suspicion.

or in concert with someone else, precisely because its doors were left unlocked. Moreover, if Hirschberg had said that he *had* locked the car's doors, the government would likely have argued that this inculpated Hirschberg since it would have been a calculated attempt not to look suspicious. But the statement that the doors were locked would also have been consistent with innocence, insofar as it would have tended to show that Hirschberg had taken reasonable measures to secure his car.

Finally, the government relies upon the sequence and timing of certain phone calls made to and from telephone numbers associated with Hirschberg and Lowrance respectively. Considered in the light most favorable to the government, this evidence does indeed suggest that "Lowrance called Hirschberg to get their stories straight." *See ante* at 13. Ordinarily, of course, this would be enough to support a jury verdict. But we are dealing here with evidence—proof of the *mere existence* of certain telephone conversations—that is rather unusual, if not unique. Even if we permit the government the inference that Hirschberg and Lowrance were parties to the conversations, we can only speculate about what was said. Although it is certainly possible that Hirschberg and Lowrance were discussing ways to "get their story straight," it is equally possible, given their prior relationship that the government took such care to establish, that Lowrance called Hirschberg to attempt to explain how it was that he (Lowrance) came into possession of Hirschberg's missing, and presumably stolen, car. Or Lowrance may have simply called Hirschberg to have a friendly chat. The point is that we have no way of knowing the content of the conversation at issue. Without such knowledge, the government's case in this respect consists of inference piled upon inference and does not adequately support Hirschberg's mail fraud conviction. *See United States v. Covelli*, 738 F.2d 847, 859 (7th Cir.), *cert. denied*, 469 U.S. 867 (1984).

All of this evidence taken together is no more persuasive than each piece considered separately. Although many bricks may make a wall, here the government has no bricks.

Because there seems to be such a strong likelihood that Hirschberg was impermissibly convicted simply because of his relationship with Lowrance, I would order a new trial for Hirschberg. *See United States v. Morales*, 910 F.2d 467, 468 (7th Cir. 1990) (holding that a new trial may be ordered when "the complete record . . . leaves a strong doubt as to the defendant's guilt, even though not so strong as to require a judgment of acquittal."). I, therefore, respectfully dissent to the extent indicated.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Corrected Date: March 24, 1993
Date: March 19, 1993

Before:

Hon. William J. Bauer, Chief Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Harlington Wood, Jr., Senior Circuit Judge

Nos. 91-2782 and 91-2783

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUDD HIRSCHBERG, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 89 CR 945—Charles P. Kocoras, Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District

Court as to Hirschberg's (No. 91-2782) mail fraud conviction is AFFIRMED and REVERSED as to his conviction for altering the vehicle identification number and the case is REMANDED to the district court for resentencing in light of this reversal. The judgment of the district court as to Lowrance's conviction (No. 91-2783) is AFFIRMED, in accordance with the decision of this court entered this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 1, 1993.

Before:

Hon. WILLIAM J. BAUER, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. HARLINGTON WOOD, JR., Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 91-2783 v.

RICHARD D. LOWRANCE,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 945—Charles P. Kocoras, Judge

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by the defendant-appellant, all of the judges on the original panel have voted to deny and no judge in active service has requested a vote thereon.*

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

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* The Honorable Walter J. Cummings took no part in the consideration of the petition.

APPENDIX D

[Dated July 17, 1991]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

JUDGMENT IN A CRIMINAL CASE
Case Number: 89 CR 945-2

(Name and Address of Defendant)
UNITED STATES OF AMERICA
v.
Richard Lowrance
1340 North Astor
Apartment 1908
Chicago, Illinois 60610

Attorney for Defendant
Jeffery Cole and Andrew Staes

THE DEFENDANT ENTERED A PLEA OF:

[☐ guilty ☐ nolo contendere] as to count(s) ____, and
☒ not guilty as to count(s) all counts.

THERE WAS A:

[☐ finding ☒ verdict] of guilty as to count(s)
Superseding Counts 4, 5, 6, 7 & 8.

THERE WAS A:

[☐ finding ☐ verdict] of not guilty as to count(s) ____.
☐ judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: knowingly, willfully and unlawfully for the purpose of executing a scheme and attempting to do so, did knowingly use the United States Mail; cause to be removed, obliterated, tampered with and altered vehicle identification numbers.

In violation of Title 18, United States Code, Sections 1341 and 511(a).

IT IS THE JUDGMENT OF THIS COURT THAT: on each of Superseding Counts 4, 5, 6, 7 & 8, the defendant is hereby placed on probation for a period of THREE (3) YEARS. The following are additional conditions of probation:

1. The first THREE (3) MONTHS of probation, the defendant is to reside in and participate in a work release program;
2. Provide 500 hours of community service as directed by the Probation Department; and
3. Make restitution in the amount of $40,000.00.

Said sentence on each of Superseding Counts 4, 5, 6, 7 & 8 to run concurrently with each other.

Sentence is hereby stayed until September 3, 1991 at which time the defendant is to surrender to the designated institution.

Defendant is given leave to travel to/from Florida until September 3, 1991, his surrender date.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes in your place of residence;
(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $250.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) Superseding Counts 4, 5, 6, 7 & 8 as follows:

$50.00 on each of Superseding Counts 4, 5, 6, 7 & 8 for a total special assessment of $250.00.

IT IS FURTHER ORDERED THAT counts all remaining counts are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

☐ The Court orders commitment to the custody of the Attorney General and recommends:

July 17, 1991
Date of Imposition of Sentence

/s/ Charles P. Kocoras
Signature of Judicial Officer

CHARLES P. KOCORAS, District Court Judge
Name and Title of Judicial Officer

July 17, 1991
Date

* * * * *